

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

GOOGLE INC.,

Third-Party Plaintiff,

v.

BENEFICIAL INNOVATIONS, INC.,

Plaintiff,

v.

ADVANCED PUBLICATIONS, INC., a New York corporation; ALM MEDIA PROPERTIES, LLC, a Delaware limited liability company; AMAZON.COM, INC., a Delaware corporation; AMERICAN MEDIA, INC., a Delaware corporation; AUTOTRADER.COM, INC., a Delaware corporation; DELL INC., a Delaware corporation; DEMAND MEDIA, INC., a Delaware corporation; EXPEDIA, INC., a Delaware corporation; RODALE INC., a Pennsylvania corporation; SCRIPPS NETWORKS, LLC, a Delaware corporation; VIACOM INC., a Delaware corporation; VILLAGE VOICE MEDIA HOLDINGS, LLC, a Delaware corporation

Defendants.

Case No. 2:11-cv-229-JRG-RSP

JURY TRIAL DEMANDED

Google' Inc.'s Brief in Opposition to Beneficial's Request to Strike Testimony

Google , Inc. ("Google") submits this brief in opposition to Beneficial's request to strike the testimony of Jonathan Bellack concerning the loss of a DoubleClick customer. Google respectfully requests that the Court deny Beneficial's request.

Google has never made any claim for damages due to customer loss. Even now, Google makes no claim for customer loss. Google seeks only an award of nominal

damages. Accordingly, Google made no disclosures concerning customer loss during discovery, and Beneficial never served discovery of any form touching on this subject.

And yet, in his cross-examination of Mr. Trinh, Mr. Adams asked Mr. Trinh if Google had ever lost any customers because of Beneficial's lawsuit. See Ex. 1 (1/21/14 PMTr.) at 133:1-3. Mr. Trinh testified, in accordance with his knowledge, that he knew of no lost customer. *Id.* On re-direct, Ms. Anderson asked Mr. Trinh if he was in a position to know this, to which Mr. Trinh explained that he was not. *Id.* at 149:23-150:10. On re-cross, Mr. Adams then returned to the subject of customer loss, criticizing Mr. Trinh for his lack of knowledge on the subject, suggesting that it was improper for Mr. Trinh to appoint himself as Google's corporate representative if he's not in a position to know this, and confirming yet again that "no customers have left." *Id.* at 156:7-157:13. To correct the record of the misimpression created by Mr. Adams, Ms. Huber asked a single question of Mr. Bellack concerning his knowledge of customer loss, to which Beneficial raised no objection at the time.

On this record, the Court should not strike Mr. Bellack's brief testimony on customer loss. Even putting aside Beneficial's failure to timely object, Mr. Adams' repeated questioning during cross and re-cross opened the door to the subject of customer loss. See *United States v. Sanchez*, 432 F. App'x 371, 375-76 (5th Cir. 2011) (testimony properly admitted because defense counsel opened door to line of questioning during cross-examination) (citing *United States v. Carey*, 589 F.3d 187, 193 (5th Cir. 2009) ("[A] defendant may not complain on appeal that he was prejudiced by evidence relating to a subject which he opened up at trial.")).

Given Beneficial's own decision to ask repeated questions on this subject, the Court should not preclude Google from curing these misimpressions. Here especially, Beneficial is not unfairly prejudiced by the admission of this testimony because Google seeks only nominal damages.

Respectfully submitted:

Dated: January 21, 2014		
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via electronic mail per Local Rule CV-5(a)(3) on January 21, 2014. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Michael E. Jones